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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NUMBER

LESTER WHEELER

VS

LYKES BROS. STEAMSHIP CO., INC.

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

Lester Wheeler, the petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Fifth Circuit, entered September 14, 1970, rehearing denied on October 14, 1970.

CITATIONS TO OPINIONS BELOW

The opinion of the Judge of the United States District Court, Eastern District of

Louisiana, Section A, printed in Appendix C hereto, was unreported. The opinion of the United States Court of Appeals, Fifth Circuit, printed in Appendix B hereto, is reported at _____ F. 2d _____. The order of the United States Court of Appeals, Fifth Circuit, denying the application for rehearing, printed in Appendix A hereto, was not reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED

(1) When cargo operations are carried over deck cargo that consist of open, naked lattice type booms (without canvas cover) secured only by one-eighth (1/8) inch soft, flexible wire which could be broken by naked hands and when this condition is known to the ship personnel but is unknown to longshoring personnel and further when the longshoring personnel, including the petitioner are allowed to work over, around and about such deck cargo in violation of 28 CFR 1504.33, then, is the shipowner, who is simultaneously the employer of the ship's crew and the longshoremen, charged with legal fault when a travelling hook on a sling grabs and catches a naked lattice boom strut breaking lashing, dislodging a boom and causing it to strike the petitioner?

(2) Is the safe passage of deck cargo on a rolling and pitching vessel at sea the proper test to be applied to that same cargo in port to determine whether or not it was safe and seaworthy for a particular cargo operation at night, involving the use of winches capable of a fifteen (15) ton pull while transferring a sling with a travelling hook that can grasp an open naked strut of a lattice boom only secured by a one-eighth (1/8) inch soft, flexible wire?

(3) When a district court finds as a matter of fact and a matter of law that an accident "...resulted solely from the longshoreman winch operator failing to raise the empty wire rope sling sufficiently high to clear the deck cargo..." and "...the sole proximate cause..." "...did not result in an unseaworthy condition..." and when the appellate court reviewing the said district court findings of fact and conclusions of law concludes that there was "no negligence on the part of the winch operator" and that further "...a determination of negligence (for the winch operator) would have been superfluous..." then what species of fault lies herein?

STATEMENT OF THE CASE

At night, about 3:30 A.M., on September 7, 1963, while Lester Wheeler was employed as a longshoring foreman, assigned to the SS MARJORIE LYKES, he was injured when a metal lattice type boom, weighing approximately 1000 pounds became violently dislodged

from its lashings, striking the petitioner, causing injury to his mind and body. At the time of the accident, the SS MARJORIE LYKES was owned, operated, stevedored, managed and in the control of Lykes Bros. Steamship Company, Inc. Additionally, at the time of the accident, all shore side personnel in the administrative office, a few feet away from the accident, who had cargo plans and cargo manifests concerning the lattice type boom, were in the direct employ of Lykes Bros. Steamship Co., Inc. The metal lattice type boom that struck the petitioner was an item of cargo loaded aboard the vessel in Bremerhaven, Germany, transported across the Atlantic Ocean, and brought to New Orleans, as an item of deck cargo.[1] At the time of the accident, this lattice type boom, one of three such booms, was resting on a flatbed trailer truck.[2] The flatbed truck was also an item of cargo. The top most lattice boom of the lattice type booms was torn from its lashings.[3] At the time of the accident, cargo operations were such that cotton ties were being discharged from the hold of the ship onto the wharf, and in the course of transferring the cotton ties from the ship to the wharf, these loads would pass over the deck cargo inshore between the hatch and the wharf.[4]

The flat bed trailer, as deck cargo, was secured to the deck of the vessel by 5/8 inch cable and metal turnbuckles,[5] but the lattice type boom that struck the appellant was only secured in four places by soft, flexible 1/8 inch wire that was described as "clothesline

wire" or "baling wire."[6] There were no chains, turnbuckles or 5/8 cables on any part of the lattice type boom. The same soft 1/8 inch wire could be broken by hand by an ordinary person without the use of tools.[7] It was one of the exposed lattice struts (without canvas cover) on the boom that caught the running hook on the dunnage wire or sling that was being returned to the vessel.[8]

As a result of the accident, Lester Wheeler sustained serious injuries of mind and body.

The case was tried on October 24, and October 25 of 1968. The matter was taken under advisement and approximately six months later, on April 17, 1969, the court signed a judgment in favor of the defendant. Thereafter, in May of 1969, the defendant prepared findings of fact and conclusions of law, submitted the same to the court, and on June 11, 1969, the court signed the findings of fact and conclusions of law, which were accepted verbatim from those referred to the court by the defendant. From that judgment of those findings of fact and conclusions of law, the petitioner, Lester Wheeler, appealed to the U. S. Court of Appeals, Fifth Circuit.

On September 14, 1970, the United States Court of Appeals, of the Fifth Circuit, affirmed the lower court judgment and thereafter on October 14, 1970, denied the petition for rehearing filed in behalf of Lester Wheeler.

On January 8, 1971, counsel for Lester Wheeler applied to the United States Supreme Court for an extension of time and on January 13, 1971 the Honorable Hugo L. Black signed an order extending the time to file a petition for writ of certiorari to and through February 16, 1971.

ARGUMENT ON QUESTION (1)

> When cargo operations are carried over deck cargo that consist of open, naked lattice type booms (without canvas cover) secured only by one-eighth (1/8) inch soft, flexible wire which could be broken by naked hands and when this condition is known to the ship personnel but is unknown to longshoring personnel and further when the longshoring personnel, including the petitioner, are allowed to work over, around and about such deck cargo in violation of 28 CFR 1504.33, then, is the shipowner, who is simultaneously the employer of the ship's crew and the longshoremen, charged with legal fault when a travelling hook on a sling grabs and catches a naked lattice boom strut breaking lashing, dislodging a boom and causing it to strike the petitioner?

The judgment in behalf of the defendant was rendered on April 19, 1969. Thereafter

in May of 1969 the defendant prepared Findings of Fact and Conclusions of Law, which were presented to the district judge and thereafter on June 11, 1969, the district court adopted the prepared Findings of Fact and Conclusions of Law verbatim. In the opinion of the district court, and specifically in Findings of Fact number (11) it was stated:

> "The accident occurred because the hook of the empty wire rope sling got caught on the deck cargo and pulled the deck cargo free from its lashings. This occurrence, ...was in no way the result of negligence or unseaworthiness on the part of the vessel or her crew... but resulted solely from the longshoreman winch operator failing to raise the empty wire rope sling sufficiently high to clear the deck cargo."

And in the Conclusions of Law of the district court below paragraph 7 stated:

> "The sole proximate cause of plaintiff's injuries was the failure on the part of the longshoreman winch operator on this isolated occasion to raise the wire rope sling to a height sufficient to avoid it becoming caught on the deck cargo... (Emphasis ours.)"

Thereafter upon appeal this matter was systematically placed upon the summary calendar pursuant to Rule 18 of the U. S. Court of Appeals for the Fifth Circuit local rules. Thereafter on September 14, 1970, in a written opinion the appellate court, among other things stated:

> "...nowhere in the court's findings of fact and conclusions of law did the trial judge 'find the winch operator negligent.' A determination of negligence would have been superfluous..."

Counsel, who prepared findings of fact and conclusions of law in behalf of the defendant herein, was also counsel for Luckenbach Overseas Corporation in Joseph Charles Usner vs. Luckenbach Overseas Corporation, _____ US _____ S. Ct. _____. The purpose of these "facts and laws" were to place the instant case of Lester Wheeler beyond the pitfalls of either Mascuilli v. United States, 387 U.S. 237, 87 S. Ct. 1705 (1967) or Joseph Charles Usner vs. Luckenbach Overseas Corporation, supra. However, the conclusions of fact and the conclusions of law adopted by the district court and as interpreted by the Fifth Circuit present other problems apparently not heretofore anticipated. As it stands, this case does not follow the popular pattern decisions of the Fifth Circuit Court of Appeals wherein longshoremen are denied recovery against the vessel by reiterating rule "that operational negligence

of a stevedore which does not create an unseaworthy condition does not render an otherwise seaworthy vessel unseaworthy." See Dugas vs. Nippon Yusen Kaisha, 378 F. 2d 271 (CA 5 1967) cert. denied_____U.S._____, 88 S. Ct. 592, Antoine vs. Lake Charles Stevedores, Inc., 376 F. 2d 443 (CA 5 1967) cert. denied 389 U.S. 869, 88 S. Ct. 145 (1967); Robichaux vs. Kerr McGee Oil Industries, Inc., 376 F. 2d 447 (CA 5 1967); Foster vs. Lykes Bros. S.S. Co., Inc., 368 F. 2d 326 (CA 5 1966) cert. denied 387 U.S. 908, 87 S. Ct. 2077 (1967) rehearing denied_____U.S. _____, 88 S. Ct. 15 (1967); Neal vs. Lykes Bros. Steamship Company, 306 F. 2d 313 (CA 5 1962).

Of course, these traditional cases of the Fifth Circuit do not apply herein because in the absence of individual negligence of the winch-operation who was the sole and proximate cause of the accident there can be no operational negligence of the stevedore. And at this point the special "fictions" applied to the instant case have more meaning when it is realized that Lykes Bros. Steamship Co., Inc. was simultaneously the stevedore, operator and shipowner, employing directly the administrative office, the members of the crew and the longshoremen who worked the vessel. To protect the shipowner any findings of negligence had to be avoided or else the negligence may have been imputed to Lykes Bros. Steamship Company, Inc., as a shipowner, rather than a stevedore, so as to make the shipowner automatically liable.

And of course, it is understandable that the appellate court would encounter difficulty and reluctant to hold that the longshoreman winch operator was negligent. Aside from the fact that the winch operator, Red Todd, did not appear at the trial, it would be difficult to hold that he was negligent inasmuch that his task as a winch operator was much like that of the man assigned to work on a tight rope: Is a worker assigned to work on a tight rope negligent when he misses his step and falls? Can it be properly determined that a winch operator is negligent when he is forced to carry loads and slings over deck cargo at night, not being informed that lattice type booms are secured to a flatbed trailer by merely one-eighth (1/8) inch soft, flexible wire?

The Fifth Circuit Court of Appeals is correct: There is no negligence on the part of this winch operator. But is that the same thing as saying there is not fault on the part of the shipowner? It is submitted that 28 CFR 1504.33 indicates otherwise that there is fault on the part of the shipowner. See Kernan vs. American Dredging Company, 355 U.S. 426, 78 S. Ct. 394 (1957).

ARGUMENT ON QUESTION (2)

Is the safe passage of deck cargo on a rolling and pitching vessel at sea the proper test to be applied to that same cargo in port to determine whether or not it was safe and

> seaworthy for a particular cargo operation at night, involving the use of winches capable of a fifteen (15) ton pull while transferring a sling with a travelling hook that can grasp an open naked strut of a lattice boom only secured by a one-eighth (1/8) inch soft, flexible wire?

In the course of the trial two ship officers, the Chief Mate and Second Mate, were of the opinion that the one-eighth (1/8) inch soft wire was adequate for the sea voyage from Germany to the United States; but neither witness voiced any opinion as to the adequacy of the same wire for the procedure of working cargo over a lattice type boom. Coming to the findings of fact, paragraph (6) as prepared by the defendant and adopted by the court it read:

> "...The crane boom was lashed to the trailer bed by double strands of wire... tightened to hold the boom firmly in position. The lashings of the flatbed trailer and the crane boom itself were in all respects suitable and proper; the deck cargo was properly secured and in a seaworthy condition; and the presence on

deck of this cargo did not interfere with or impede the cargo operations."

Perhaps the accident did not happen or perhaps this is a misplaced paragraph that actually belongs to some other lawsuit. In any event, the Fifth Circuit Court of Appeals in their September 14, 1970 opinion elaborated:

"...we find, ample evidence to support the district court's conclusion that the deck cargo was properly secured. There was evidence of multiple inspections of the deck cargo lashings before the SS MARJORIE LYKES sailed to the United States and during her voyage."

However, even assuming that this cargo was lashed in port in the same manner as it had been lashed at sea, does this indicate that the lattice type boom was properly placed and properly lashed at the time of the accident when a sling with a travelling hook was being carried over this deck cargo? That is the question which should have been answered in the lower court and in the Court of Appeals.

Seaworthiness is relative term and concept. See May vs. Hamburg-Amerikanische Packetfahrt Aktienggesellschaft (The Isis) (1933) 290 US 333, 54 S. Ct. 162. It depends

among other things on places and circumstances. What may be unseaworthiness in one instance, can well mean a seaworthy ship under a dissimilar circumstance.[9] As stated by Judge A. N. Hand in the H. A. Scandrett: "A ship is an instrumentality full of internal hazards, aggravated, if not created, by the uses to which she is put."

The one-eighth (1/8) inch soft wire, in itself, per se was not a hazard or unsafe item. Likewise, the lattice boom uncovered by canvas, in itself, was not a hazard. Nor was the travelling hook on the sling. However, at night, when the lattice type boom was secured only by a one-eighth (1/8) inch soft wire, at the same time cargo operations were carried overhead, a true hazard was created.

As pointed out in Gutierrez vs. Waterman S.S. Corp. (1963) 373 U.S. 206, 83 S. Ct. 1185, cargo has this significance:

> "...Seaworthiness is not limited, of course, to fitness for travel on the high seas; it includes fitness for loading and unloading. Seas Shipping Co. v. Sieracki, 328 U.S. 85. It has already been held that when cargo is stowed unsafely in the hold a longshoreman injured thereby may recover for

unseaworthiness. E.g., Rich vs. Ellerman & Bucknall Co., 278 F. 2d 704, 706 (C.A. 2d Cir.); Curtis v. A. Garcia y Cia., F. 2d 30, 33-34 (CA 3d Cir.); Palazzolo v. Pan-Atlantic Corp., 211 F. 2d 277, 279 (C.A. 2d Cir.), aff'd on other grounds, 350 U.S. 124, 134; see Morales v. City of Galveston, 370 U.S. 165, 170 (dictum). And in at least one case it has been held that a longshoreman could not recover for injuries caused by a 'latent defect' in a cargo crate which broke when the longshoreman stood on it. Reddick v. McAllister Line, 258 F. 2d 297, 299 (C.A. 2d Cir.)

These cases all reveal a proper application of the seaworthiness doctrine, which is in essence that things about a ship, whether the hull, the decks, the machinery, the tools furnished, the stowage, or the cargo containers, must be reasonably fit for the purpose for which they are to be used. See Mitchell v.

Trawler Racer, Inc., 362 U.S. 539, 550; Morales v. City of Galveston, 370 U.S. 165, 169, 172 (dissenting opinion)..."

The accident of Lester Wheeler is not merely an accident whereby in one simple act a winch operator failed to lift a cargo sling high enough. There were other forces, events and mechanics involved. Of course, the existence of the soft, one-eighth (1/8) inch flexible wire, together with a naked, exposed lattice type boom, stowed inshore between the hatch and the discharging wharf were factors proximately involved in the mechanics of the accident. The fact that crew personnel knew about the one-eighth (1/8) inch soft wire and the longshoring personnel did not know was another pertinent factor that was a proximate cause.

This may not be unseaworthiness, but it is surely some type of fault chargeable to the shipowner, as a shipowner.

ARGUMENT ON QUESTION (3)

When a district court finds as a matter of fact and a matter of law that an accident "...resulted solely from the longshoreman winch operator failing to raise the empty wire rope

sling sufficiently high to clear the deck cargo..." and this "...the sole proximate cause..." "...did not result in an unseaworthy condition..." and when the appellate court reviewing the said district court findings of fact and conclusions of law concludes that there was "no negligence on the part of the winch operator" and that further "...a determination of negligence (for the winch operator) would have been superfluous..." then what species of fault lies herein?

Assuming the facts as assumed by the defendant, adopted by the district court and reaffirmed by the appellate court, how are the actions of the winch operator to be evaluated? However, this does not place the instant case in the same position as Usner vs. Luckenbach Overseas Corporation, supra. In Usner the main question involved was whether a ship is rendered unseaworthy as a result of the instantaneous negligence of stevedores, when this negligence resulted in the injury of a longshoreman, when all the equipment and appurtenances aboard the ship were admittedly in a seaworthy condition.

In the instant case, there is said to be no negligence or unseaworthiness involved in the accident. The vessel, pursuant to the district court, was not unseaworthy and the winchman who was the sole proximate cause of the accident, according to the Fifth Circuit Court of Appeals was not negligent. Therefore, it remains that either a seaworthy ship caused the accident or a non-negligent winch operator caused the accident. Or else, there was some other type fault involved.

Then what species of fault lies herein? What fault lies when Lester Wheeler is forced to work over and around deck cargo at night, not being informed that lattice type booms are secured to a flatbed trailer by merely one-eighth (1/8) inch soft, flexible wire?

It is readily understandable that the Fifth Circuit Court of Appeals would determine there was no negligence on the part of the winch operator. It is difficult to ascertain that there was no unseaworthiness involved in the accident. However, if it is granted that there was no negligence or unseaworthiness involved, then is this the same thing as saying there is no fault on the part of the shipowner? It is submitted that 28 CFR 1504.33 indicates otherwise, that there was fault on the part of the shipowner. See Kernan vs. American Dredging Company, 355 U.S. 426, 78 S. Ct. 394 (1957). Also, see Albanese v. N. V. Nederlandsch Amerikaansche Stoomvaart Maatschappij (1965) 382 US 283, 86 S. Ct. 429.

The judgments below ignored that the accident, as herein complained, was foreseeable and could have been prevented.

If the deck cargo had been removed from the vessel and placed out of harm's way on the dock, the accident could have been avoided. If a canvas cover had been placed over the lattice type boom, the travelling hook on the sling would not have grasped a strut. If the lattice type boom had been secured with chains, cables and turn buckles, the accident would have been avoided. Whether or not there is negligence and whether or not there is unseaworthiness there is one said fact obvious in the instant case, the employer through its chief officer and its administrative employees who had a cargo plan could have or should have foreseen the risk of danger involved in the operation of moving cargo over deck cargo which was a naked lattice type boom secured only with one-eighth (1/8) inch soft wire. See Pope & Talbot, Inc. vs. Hawn (1953) 346 US 406, 74 S. Ct. 202 and also see Hartford Accident & Ind. Co. vs. Gulf Refining Co., 230 F. 2d 346 (5th Cir. 1956) cert. denied 77 S. Ct. 49, 352 U.S. 832.

On the bases of the foregoing, the petitioner urges that the judgment of the district court, as affirmed by the Fifth Circuit Court of Appeals is in error. This cause should be remanded to the district court to prepare proper findings of fact pursuant to the trial record and to ascertain in a fair and proper proportion the fault of the shipowner

that lies herein. If the accident, as complained, did not result from unseaworthiness and/or negligence, then the fault should be more properly defined.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ELDON E. FALLON
1718 National Bank of Commerce Bldg., New Orleans, La. 70112
and
CHARLES R. MALONEY
822 Richards Building
New Orleans, Louisiana 70112
Telephone: 522-9039

BY: _____
CHARLES R. MALONEY

PROOF OF SERVICE

I, Charles R. Maloney, an attorney for the petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day, I served copies of the foregoing Petition for Writ of Certiorari on Mr. Maurie D. Yager, counsel for respondent by mailing a copy thereof, postage prepaid, addressed to his office at 2141 International Trade Mart Building, 2 Canal Street, New Orleans, Louisiana 70130.

Dated this _____ day of _____, 1971.

_____

CHARLES R. MALONEY

FOOTNOTES

(1) See testimony of Harold Daniel King, Page 123 and following;

(2) See testimony of William A. Petersen, Page 127 and following;

(3) See Petersen testimony, Pages 136 and 137;

(4) The testimony of all the longshoremen, who were eye-witnesses to accident, bear this out;

(5) See testimony of William A. Petersen, Page 135;

(6) See testimony of William A. Petersen, Jr., Pages 127 and 135;
See testimony of Abe Collins, Pages 152 and 153;
See testimony of Daniel John Ferris, Page 11;
See testimony of James McLemore, Pages 31 and 32;
See testimony of Daniel Wheeler, Page 50;
See testimony of Lester Wheeler, Page 92;

(7) See testimony of Daniel John Ferris, Page 11;
See testimony of James McLemore, Page 32;

(8) See testimony of Daniel John Ferris, Page 14;

(9) See Lester vs. United States, 234 F. 2d 625, 1956 AMC 1885 (CA 2d 1956).

United States Court of Appeals
Fifth Circuit
Office of the Clerk

October 14, 1970

Edward W. Wadsworth
Clerk

Rm. 408-400 Royal St.
N. O., La. 70130

TO ALL PARTIES LISTED BELOW

Re: No. 28756 - Wheeler vs. Lykes Bros. Steamship Co., Inc., et al

Gentlemen:

You are hereby advised that the Court has today entered an order denying the Petition ( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ Pat Quastararo
Deputy Clerk

/paq

cc: Mr. Charles R. Maloney
Mr. Eldon E. Fallon
Mr. M. D. Yager

APPENDIX (A)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 28756
Summary Calendar*

LESTER WHEELER,
Plaintiff-Appellant

versus

LYKES BROTHERS
STEAMSHIP COMPANY, INC., ET AL
Defendants-Appellees

Appeal from the United States District Court
for the
Eastern District of Louisiana

(September 14, 1970)

Before WISDOM, THORNBERRY and CLARK
Circuit Judges

PER CURIAM: The main question on appeal in this admiralty suit is whether the record

*Rule 18, 5th Cir., See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5th Cir. 1970, _____F.2d_____, Part I (No. 29278, August 14, 1970).

supports the district court's findings of fact and judgment in favor of defendant-appellee Lykes Bros. Steamship Co. The plaintiff alleges that injuries he received while working aboard the SS MARJORIE LYKES as a stevedore foreman proximately resulted from an unseaworthy condition of the vessel, namely, the insecure lashings of the cargo. The accident occurred in the following manner: The plaintiff was supervising cargo discharge operations at the No. 3 hatch in the early morning hours of September 7, 1963. The longshoremen were discharging bundles of cotton ties, using the vessel's cargo gear to which was attached wire rope slings with an eye at each end and a traveling hook in between. The wire rope slings were used to carry the bundles from the ship to the wharf, with the empty slings then being returned from the wharf to the hatch by the vessel's cargo gear. The accident occurred as plaintiff was standing on the main deck along the inshore or starboard coaming of the No. 3 hatch and was looking into the cargo hold. He turned to his left and started to walk aft when he was struck by a section of a portable crane boom which was part of the ship's deck cargo and was lashed to a flatbed trailer, also part of the deck cargo, stowed on the starboard side of the hatch. The crane boom was lashed to the trailer bed by double strands of wire placed along the length of the boom and tightened to hold the boom firmly in position. The accident occurred when the empty wire rope sling was being returned from the wharf

to the hatch by the No. 3 hatch winches and became caught on the deck cargo, pulling it free from its lashings.

The plaintiff alleged that the accident was a proximate result of the inadequate lashings which secured the crane boom to the trailer bed. These lashings were of 8 gauge wire. The plaintiff complains that the district court ignored all the testimony on this point, but the record discloses, and we find, ample evidence to support the district court's conclusion that the deck cargo was properly secured. There was evidence of multiple inspections of the deck cargo lashings before the SS MARJORIE LYKES sailed to the United States and during her voyage. Also, the cargo was secured by double strands of this wire at several different points along the crane boom. Furthermore, there is direct evidence that the accident occurred because the longshoreman winch operator failed to raise the empty wire rope sling sufficiently high to clear the deck cargo.

Plaintiff also contends that "somehow (he) did not receive full due process" because the winch operator, whom the district court concluded was the cause of the accident, was not called as a witness by the appellee. Plaintiff appears to rest this argument on the idea that the district court could not properly find the winch operator negligent unless the court had heard the winch operator's testimony.

There is no merit to this argument. In the first place, nowhere in the court's findings of fact and conclusions of law did the trial judge "find the winch operator negligent." A determination of negligence would have been superfluous because the district judge was simply trying to ascertain what caused the deck cargo to fall. Since there was already ample and direct evidence that the cargo hook hung up on the boom and pulled it right off the trailer, and further, that there was no difficulty entailed in clearing the deck cargo if the winch operator raised the sling high enough, the winch operator's testimony was unnecessary.

As a final point, the plaintiff asserts that the district court "ignored" the Safety and Health Regulations for Longshoring pertaining to working surfaces and deck loads. This Regulation provides that "(e)mployees shall not be permitted to pass fore and aft over or around the deck loads unless there is safe passage." 29 C.F.R. § 1504.33. The requirement of a "safe passage," of course, calls for another fact determination by the trial court, and we cannot say that just because the trial court held against the plaintiff, it "ignored" the safety regulation. This point appears to be simply another way for the plaintiff to argue his differences with the fact findings of the trial court. There is no reversible error here.

We AFFIRM.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

LESTER WHEELER	SECTION "A"
V.	NO. 6664
LYKES BROS. STEAMSHIP	ADMIRALTY

CHRISTENBERRY, J.

Plaintiff brought suit against defendant Lykes Bros. Steamship Co., Inc. and its vessel, the SS MARJORIE LYKES, seeking to recover damages for injuries sustained while working in defendant's employ as a stevedore foreman on September 7, 1963. Plaintiff alleges that his injuries proximately resulted from the unseaworthiness of the SS MARJORIE LYKES and the negligence of her officers and crewmembers in that cargo stowed on the vessel's main deck was not properly secured and was thereby caused or permitted to strike and injure him.

This case was tried to the court and after considering the testimony of the witnesses and the briefs of the parties, the court rendered a judgment in favor of the defendant and the SS MAJORIE LYKES and against the plaintiff, dismissing the suit at plaintiff's cost. In connection therewith, the court now enters

the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. During the evening of September 6 and the early morning hours of September 7, 1963, plaintiff was employed by defendant and was engaged in the course and scope of his employment as a stevedore foreman, working aboard the SS MARJORIE LYKES, owned and operated by the defendant and then afloat in the Mississippi River in the Port of New Orleans, Louisiana.

2. The SS MARJORIE LYKES had called at Bremerhaven on August 19, 1963, and at that port there was loaded on the vessel's main deck, alongside several hatches, deck cargo consisting of flatbed trailers to the beds of which there were lashed sections of portable crane booms. From Bremerhaven the vessel proceeded to the Ports of Bremen, Antwerp and Southampton, and then crossed the Atlantic Ocean, arriving at the Port of New Orleans on September 6, 1963.

3. The flatbed trailers and portable crane booms had been shipped by the United States Army and had been loaded as units aboard the vessel. Before the MARJORIE LYKES sailed on her return voyage to the United States, the vessel's chief mate personally inspected all of the deck cargo lashings and found the cargo well secured.

Thereafter, while the ship was underway, the lashings on all deck cargo were inspected daily and were found to be in good condition, securely holding the deck cargo in place.

4. The MARJORIE LYKES docked starboard side to the Nashville Avenue Wharf in the Port of New Orleans during the afternoon of September 6, 1963, and discharging of cargo began. During the evening of September 6 and the early hours of September 7, 1963, cargo operations at the No. 3 hatch were conducted by longshoremen working under the supervision of plaintiff Lester Wheeler as stevedore foreman. The longshoremen were discharging bundles of cotton ties, using the vessel's cargo gear to which was attached wire rope slings with an eye at each end and a traveling hook in between. The wire rope slings were used to carry the bundles from the ship to the wharf, with the empty slings then being returned from the wharf to the hatch by the vessel's cargo gear.

5. The plaintiff, as foreman, was in charge of and supervised the cargo operations at the No. 3 hatch throughout the evening of September 6 and the early hours of September 7, 1963. At about 3:30 a.m., September 7, plaintiff was standing on the main deck along the inshore or starboard coaming of the No. 3 hatch (at a point approximately midway between the forward and after ends of the hatch) and was looking into the cargo hold. He turned to his left and started to walk aft when he was struck by a section of portable crane

boom as a result of a momentary lapse in the operation and handling of the No. 3 after winches and cargo gear by a longshoreman. The section of portable crane boom was caught by the hook on the empty wire rope sling, only one eye of which sling was attached to the cargo hook, which sling was at the time being returned from the wharf to the hatch by the No. 3 after winches and cargo gear.

6. The crane boom in question was on a flatbed trailer stowed on deck on the starboard side of the hatch. The crane boom was lashed to the trailer bed by double strands of wire placed along the length of the boom and tightened to hold the boom firmly in position. The lashings of the flatbed trailer and the crane boom itself were in all respects suitable and proper; the deck cargo was properly secured and in a seaworthy condition; and the presence on deck of this cargo did not interfere with or impede the cargo operations.

7. At the time of the accident, the vessel's deck area and the dock were properly illuminated, the winches, booms, cargo runners, wire rope slings, and other gear, machinery and equipment at the No. 3 hatch were in good operating condition, functioning properly, and safe and suitable for use. The methods and procedures being followed in the cargo operations were proper.

8. Prior to and up until the time of the accident, the deck cargo, including the portable crane boom in question, was safely

and properly stowed and secured. The portable crane boom was properly stowed and secured by use of double strands of wire placed along the length of the boom, holding the boom firmly in place upon the trailer bed.

9. The officers and crewmembers of the SS MARJORIE LYKES were not present in the area of the accident at the time of its occurrence, and the longshoremen conducting the cargo operations at the No. 3 hatch were under the direct supervision and control of the plaintiff, their foreman.

10. The accident and resulting injuries sustained by the plaintiff were not caused or contributed to by any fault or neglect on the part of the ship's officers or crewmembers or by any condition of unseaworthiness, the SS MARJORIE LYKES, her gear, appurtenances, equipment, cargo, and the cargo lashings having been in good condition and reasonably fit for their intended purposes.

11. The accident occurred because the hook of the empty wire rope sling got caught on the deck cargo and pulled the deck cargo free from its lashings. This occurrence, the pulling of the deck cargo free from its lashings, was in no way the result of negligence or unseaworthiness on the part of the vessel or her crew, as set forth above, but resulted solely from the longshoreman winch operator failing to raise the empty wire rope sling sufficiently high to clear the deck cargo.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the parties and the subject matter of this suit, and venue is properly laid in the Eastern District of Louisiana.

2. The plaintiff bears the burden of proving by a preponderance of the evidence that the shipowner was negligent or that the vessel was unseaworthy and that such negligence and/or unseaworthiness was a proximate cause of his injuries. The mere occurrence of an accident aboard ship does not render the vessel owner liable.

3. The shipowner is not required to provide an "accident free" ship. The shipowner's duty is to furnish a vessel and her appurtenances, gear, equipment and cargo reasonably fit for their intended uses or purposes. The standard is not perfection, but reasonable fitness or suitability for the intended service. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed. 2d 941 (1960).

4. The officers and crewmembers of the SS MARJORIE LYKES were not negligent and did not cause or contribute to plaintiff's injuries.

5. The SS MARJORIE LYKES and her gear, equipment, appurtenances and cargo were in all respects reasonably fit and

suitable. The portable crane boom and its lashings were properly secured and were in all respects seaworthy.

6. The plaintiff failed to prove that his injuries were caused or contributed to by any unseaworthy condition aboard the vessel. Since the vessel, including the deck cargo, was seaworthy and the officers and crew-members were not negligent, and since the accident resulted from the failure of the winch operator to raise the empty wire rope sling sufficiently high to clear the deck cargo, the plaintiff is not entitled to recovery herein.

7. The sole proximate cause of plaintiff's injuries was the failure on the part of the longshoreman winch operator on this isolated occasion to raise the wire rope sling to a height sufficient to avoid its becoming caught on the deck cargo. This failure occurred at the moment of plaintiff's injuries, did not cause or result in an unseaworthy condition, and did not call into play a pre-existing condition of unseaworthiness. The action of the longshoreman winch operator in the use of seaworthy equipment in dislodging properly secured and seaworthy cargo did not render the vessel unseaworthy and does not give rise to liability, apart from compensation act benefits, against the defendants. Antoine v. Lake Charles Stevedores, Inc., 376 F. 2d 443 (5 CA 1967) and Neal v. Lykes Bros. Steamship Co., Inc., 306 F. 2d 313 (5 CA 1962).

Accordingly, judgment has been entered in favor of the defendant and the SS MARJORIE LYKES, dismissing plaintiff's suit at his cost.

New Orleans, Louisiana this 11th day of June, 1969.

/s/ Herbert W. Christenberry
UNITED STATES DISTRICT JUDGE

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
MAR 18 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 1359

LESTER WHEELER,

Petitioner,

versus

LYKES BROS. STEAMSHIP CO., INC.

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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MAY IT PLEASE THE COURT:

Not only is there no important or special reason for granting a writ of certiorari in this case, there is no reason whatsoever to do so.

This case involves a simple question of whether a longshoreman (petitioner herein) was injured as a result of unseaworthiness, or whether his accident occurred due to the single,isolated personal negligent

act on the part of a fellow longshoreman.

The district court, after a full trial on the merits and after hearing the witnesses in open court, decided for the respondent herein and concluded that the petitioner's remedy was limited to recovery of compensation benefits under the Longshoremen's and Harbor Workers' Act because the accident resulted solely from a fellow longshoreman's negligence and not from unseaworthiness.

On appeal, the Court of Appeals correctly pointed out that the case raised one issue: did the record support the findings, conclusions, and judgment in favor of respondent. After full briefing and consideration, the Court of Appeals affirmed the judgment of the trial court and specifically found that the findings, conclusions and judgment are all supported by the record. The opinion below has been reported officially in 431 F. 2d 570.

While petitioner's brief is somewhat difficult to follow in setting forth the questions presented and the arguments with respect to the issues, it appears to us that only two comments of petitioner require reply: (1) the contention that the Court of Appeals "determined" there was no negligence on the part of the winch operator, and (2) the suggestion that the trial court's findings of fact and conclusions of law were designed to place the case "beyond the pitfalls" of Usner v. Luckenbach Overseas Corporation, ___U.S. _____, 91 S.Ct. ____, 27 L.Ed. 2d 562 (1971).

The first point, the alleged exculpation of the winch operator by the Court of Appeals, evolves from petitioner extracting out of context a statement in the court's opinion and twisting that statement from its original meaning. A full review of the opinion will show conclusively that the Court of Appeals did not hold the winch operator was free from negligence or fault. In fact, to the contrary, the court specifically observed "there is direct evidence that the accident occurred because the longshoreman winch operator failed to raise the empty wire rope sling sufficiently high to clear the deck cargo". Accordingly, the suggestion of petitioner that the Court of Appeals concluded in its opinion that negligence was not the cause of the accident, as found by the trial court, is entirely without merit.*

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* The trial court clearly held that negligence of the longshoreman winch operator and not unseaworthiness was the cause of the accident, stating:

> "The sole proximate cause of plaintiff's injuries was the failure on the part of the longshoreman winch operator on this isolated occasion to raise the wire rope sling to a height sufficient to avoid becoming caught on the deck cargo. This failure occurred at the moment of plaintiff's injuries, did not cause or result in an unseaworthy condition, and did not call into

(continued on next page)

The idea, on the second point, that the "purpose" of the trial court's findings of fact and conclusions of law was to escape the "pitfalls" of Usner, supra, is equally unavailing to petitioner. Indeed, it is precisely this recent decision of this Court which completely supports and fully substantiates the decisions of both courts below in the instant matter. In Usner, just as in the present case, "what caused the petitioner's injuries ... was not the condition of the ship, her appurtenances, her cargo or her crew, but the isolated, personal negligent act of the petitioner's fellow longshoreman".

Accordingly, the Usner decision, coupled with the findings of the trial court as affirmed by the Court of Appeals, leave no room whatsoever for the granting of a writ in the instant case. The findings and

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play a pre-existing condition of unseaworthiness. The action of the longshoreman winch operator in the use of seaworthy equipment in dislodging properly secured and seaworthy cargo did not render the vessel unseaworthy and does not give rise to liability, apart from compensation act benefits, against the defendants. Antoine v. Lake Charles Stevedores, Inc., 376 F.2d 443 (5 CA 1967) and Neal v. Lykes Bros. Steamship Co., Inc., 306 F. 2d 313 (5 CA 1962)."

judgments of the lower courts are all fully supported by the record and by the Usner decision of this Court, and thus there exists no reason to grant a writ of certiorari and the petition should be denied.

Respectfully submitted,

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CERTIFICATE

I, the undersigned member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of this brief in opposition to the granting of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit has been served upon attorneys for petitioner by depositing the same, properly addressed, in the United States mails, postage prepaid at New Orleans, Louisiana, this _____ day of March, 1971.

WILLIAM E. WRIGHT